In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00392-CV

TODD CUSTER, Appellant

V.

JUDY FISCHER, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 10-03-02738-CV

MEMORANDUM OPINION

Appellee, Judy Fischer, filed suit against Todd Custer, D.C., and Houston Spine and Rehabilitation Center [1] alleging that Fischer sustained a torn rotator cuff during a chiropractic adjustment. Custer filed a motion to dismiss the suit pursuant to section 74.351 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (West Supp. 2010). The trial court denied Custer's motion and this

[1] Houston Spine and Rehabilitation Center was never served.

interlocutory appeal followed. We find that the expert report was deficient and reverse the trial court's order and remand the case for further proceedings.

BACKGROUND

In her Original Petition, Fischer alleged that the chiropractic adjustments began on or about March 5, 2008, and continued through March 20, 2008. Fischer alleged that during her adjustment she suffered a torn rotator cuff attributable to Custer's use of excessive force. Fischer alleged that Custer was negligent for failing to perform necessary medical treatment "according to the standards set by the Chiropractic profession[,]" and by performing "needless and unnecessary [a]djustments . . . when a less severe means of treatment could have provided the necessary and proper cure for [Fischer's] medical condition."

Pursuant to section 74.351 of the Texas Civil Practice and Remedies Code, Fischer timely served an expert report and curriculum vitae from Andrew W. Light, D.C. In his report, Light explains that Fischer stated that she sustained a right shoulder injury during a chiropractic side posture manipulation of the left sacroiliac joint on March 20, 2008. Light states that after reviewing the details of the delivery and technique of Fischer's adjustment, it is his "professional opinion that [Fischer's] right rotator cuff could have easily been re-injured due to the torsional forces placed on her right shoulder capsule and rotator cuff during this chiropractic manipulation." Light's report stated as follows:

1. Ms. [Fischer] had an initial exam performed by the chiropractor that illustrated her history of injury and surgical repair of the right shoulder rotator cuff.
2. Ms. [Fischer] was instructed to [lie] on her right hip and right shoulder with her left knee and hip flexed and her right leg extended straight. Her upper torso was then rotated to the left where her upper trunk and shoulders lay flatter to the table.
3. The chiropractor then instructed Ms. [Fischer] to place her right hand onto her left shoulder as the chiropractor stood behind Ms. [Fischer] at the right side of the adjusting table.
4. The chiropractor then placed his knee onto Ms. [Fischer]'s left sacroiliac joint as the primary contact point while using her right hand and left shoulder as the secondary contact point.
5. Ms. [Fischer] was instructed to take a deep breath and exhale while the chiropractor pushed with his knee with a posterior to anterior line-of-drive while pulling/pushing in the opposite direction (anterior to posterior) from his secondary contact point at her right hand and left shoulder.
6. The chiropractor did not feel a cavitation or release at the left sacroiliac joint after his first impulse, so he immediately performed a secondary impulse.

The type of adjustment this chiropractor used in this case is considered a modified side posture adjustment technique that involves a long lever, high velocity, and high amplitude force that relays greater torsional forces to the lumbar and thoracic spine compared to that of a traditional diversified side posture adjustment technique where the chiropractor is facing the patient and using only his hands and arms as the "lever" and not the knee.

During a chiropractic side posture manipulation, the two contact points receive the most amplitude of force during the adjustment. Considering that Ms. [Fischer] had a previous shoulder injury, the type of adjustment used in this case is questionable because it would not be the most appropriate choice of adjustment for a patient with a previous shoulder injury. Another type or technique of side posture adjustment that eliminated Ms. [Fischer]'s right shoulder from any torsional or pulling forces during the manipulation would have been more appropriate in Ms. [Fischer]'s treatment.

It is my professional opinion that the type of chiropractic side posture

> manipulation administered could have easily provided enough torsional forces to re-injure Ms. [Fischer]'s right rotator cuff due to the fact that the scar tissue in Ms. [Fischer]'s right shoulder is not as stable, elastic, or strong as normal, healthy connective tissue.
>
> In summary, it is my opinion based on the information reviewed, the patient in this case was injured by the modified side-posture adjustment performed by Dr. Custer and, based upon the medical history of [Ms. Fischer], the care rendered by Dr. Custer fell below the acceptable standard of care for Doctors of Chiropractic in Texas. The chiropractic treatment in this case in all medical/chiropractic probability caused the damage to [Ms. Fischer's] rotator cuff.

Custer timely objected to the expert report and moved to dismiss the case. In his motion to dismiss Custer argued that because Light is a doctor of chiropractic and not a physician he is unqualified under section 74.403 to opine on causation; therefore, the expert report is equivalent to "no expert report" on causation and Fischer's claims against Custer must be dismissed with prejudice. Fischer filed a response asserting that Light's report was sufficient, but alternatively requested the court grant a thirty-day extension to cure any alleged deficiencies. The trial court found the report sufficient and overruled Custer's motion to dismiss.

STANDARD OF REVIEW

We review a trial court's denial of a motion to dismiss under section 74.351 for an abuse of discretion. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001). "A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Bowie Mem'l*

Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex. 2002). A trial court also abuses its discretion if it fails to analyze or apply the law correctly. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

DISCUSSION

Pursuant to section 74.351 of the Texas Civil Practice and Remedies Code, a plaintiff who asserts a health care liability claim must provide each defendant physician or health care provider with one or more expert reports, and curriculum vitae of each expert no later than the 120th day after filing suit. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). The statute defines a "health care provider" to include a chiropractor. *Id*. § 74.001(a)(12)(A)(v) (West 2005). The statute defines an "expert report" as:

> [A] written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

Id. § 74.351(r)(6). "Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served[.]" *Id*. § 74.351(a). If a plaintiff does not serve an expert report within the statutory time frame, the trial court, on motion of the affected defendant, shall, subject to section 74.351(c), enter an order dismissing the case with prejudice. *Id*. § 74.351(b)(2). Pursuant to subsection (c), "[i]f an expert report has not been served within [120 days] because elements of the report are found deficient, the

court may grant one 30-day extension to the claimant in order to cure the deficiency." *Id.* § 74.351(c).

When a plaintiff timely files a report and a defendant moves to dismiss because of the report's inadequacy, the trial court must grant the motion only if it appears to the court, after a hearing, that the report does not represent a good faith effort to comply with the statutory definition of an expert report. *Id.* § 74.351(*l*). To constitute a good faith effort, the report must "discuss the standard of care, breach, and causation with sufficient specificity to inform the defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit." *Palacios*, 46 S.W.3d at 875; *see also Bowie*, 79 S.W.3d at 52. "The report cannot merely state the expert's conclusions about these elements but must explain the basis of the statements, linking the conclusions to the facts." *Petty v. Churner*, 310 S.W.3d 131, 134 (Tex. App.—Dallas 2010, no pet.) (citing *Bowie*, 79 S.W.3d at 52). An expert report need not marshal all the plaintiff's proof; however, a report that omits any of the elements required by the statute does not constitute a good faith effort, and thus is deficient. *Palacios*, 46 S.W.3d at 878-79.

In the present case, Custer moved to dismiss the suit on the basis that Fischer failed to timely file an expert report arguing that Fischer's report was "equivalent to providing 'no expert report' on causation within the statutorily required time frame." "If a party fails to serve an expert report in any form within the time permitted, the trial court has no

discretion to grant an extension and must dismiss the claims." *Petty*, 310 S.W.3d at 137; *see* Tex. Civ. Prac. & Rem. Code § 74.351(b). Custer contends that because no report was served, the trial court erred in denying his motion to dismiss the claim and the case should be dismissed with prejudice.

The statute defines an expert, with respect to a person giving opinion testimony on causation as "a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence[.]" *Id*. § 74.351(r)(5)(C). The statute further sets forth the qualifications of an expert witness on causation in health care liability claims. *Id*. § 74.403 (West 2005). The statute provides in pertinent part:

> Except as provided by Subsections (b) and (c), in a suit involving a health care liability claim against a physician or health care provider, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed only if the person is a physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

Id. § 74.403(a). Because a chiropractor is not licensed to practice medicine, a chiropractor is not a physician. *See Li v. Billingsley*, No. 05-08-00436-CV, 2009 WL 242523, at *2 (Tex. App.—Dallas Feb. 3, 2009, no pet.) (mem. op.). We agree that Light is unqualified to render an opinion on causation. *See* Tex. Civ. Prac. & Rem. Code § 74.403(a). However we disagree that this deficiency renders the report absent. *See HealthSouth of Houston, Inc. v. Parks,* No. 09-10-00317-CV, 2010 WL 4997455, at **6-7 (Tex. App.—Beaumont Dec. 9, 2010, no pet. h.) (citing *Ogletree v. Matthews*, 262 S.W.3d 316,

319 (Tex. 2007)); *see also Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671 n.2 (Tex. 2008) (noting that while defendants contend that the report is deficient because the expert was not qualified to render an opinion, such a deficiency would be subject to cure on remand); *Scoresby v. Santillan*, 287 S.W.3d 319 (Tex. App.—Fort Worth 2009, pet. granted) (concluding that a determination that a timely filed expert report is tantamount to no report at all and thus ineligible for section 74.351(c) extension would "constitute a modification" of current supreme court precedent).

In *HealthSouth*, the defendant moved to dismiss plaintiff's claim after the plaintiff filed an expert report signed only by a nurse. *HealthSouth*, 2010 WL 4997455, at *1. Like Custer, the *HealthSouth* defendant argued that because the expert report lacked a physician's opinion on causation, the report was not only deficient, but absent. *Id*. at *2. We analyzed the current state of the law regarding deficient versus absent expert reports under section 74.351. *Id*. at *4-7. We rejected the argument that a timely filed report, which implicates the defendant's conduct, may be so deficient that it is deemed "no report," which would prevent the trial court from exercising its discretion to grant a thirty-day extension for plaintiff to cure the deficiencies. *Id*. at *7. We noted that while the Texas Supreme Court has not directly resolved this issue, the Court has recognized that "'a deficient report differs from an absent report[,]'" and to date the Court has not embraced the existence of a category of expert reports so deficient that they are deemed

absent. [2] *Id*. at *6-7 (quoting *Ogletree*, 262 S.W.3d at 320); *see also Scoresby*, 287 S.W.3d at 322-25; *Cook, P.A. v. Spears*, 275 S.W.3d 577, 580-82 (Tex. App.—Dallas 2008, no pet.) ("We decline appellant's invitation to create a 'third category' of reports."). Because the report in *HealthSouth* was insufficient on the issue of causation, we reversed the judgment and remanded the case to the trial court to consider whether the plaintiff was entitled to a thirty-day extension to cure the report's deficiency. *Id*. at *7. Light's report is also deficient on causation. Likewise, this deficiency is subject to cure on remand. *See HealthSouth*, 2010 WL 4997455, at *7; *see also Gardner*, 274 S.W.3d at 671 n.2; *see generally In re Buster*, 275 S.W.3d 475, 476-77 (Tex. 2008) (holding trial court did not abuse its discretion in granting thirty-day extension to cure when report lacked physician's

[2] At the time of writing in the present case, the Texas Supreme Court still has not directly resolved this issue. In *Scoresby v. Santillan*, the Fort Worth Court of Appeals stated:

> Whether or not the court in *Ogletree* intended to "limit[] the universe of possible reports" to absent reports and deficient reports, that is the limitation that we reasonably construe from the opinion's analysis. At present, neither *Ogletree* nor any other supreme court opinion holds that a timely served expert report containing a narrative that fails to include any expert opinion on the standard of care, breach, or causation, is tantamount to no report at all and thus ineligible for any section 74.351(c) extension. Until a majority of the supreme court so holds, such a determination by this court would necessarily constitute a modification to *Ogletree's* absent or deficient expert report limitation, which would be improper because we are bound as an intermediate appellate court by supreme court precedent.

Scoresby, 287 S.W.3d at 324 (footnote omitted). We note that the Texas Supreme Court granted review in this case on August 27, 2010, and heard argument on the petition on November 8, 2010.

opinion on causation); *Lewis v. Funderbunk*, 253 S.W.3d 204, 208 (Tex. 2008) (concluding that a deficiency may be cured by serving a report from a new expert).

CONCLUSION

The trial court erred in concluding Light's report was sufficient. *See* Tex. Civ. Prac. & Rem. Code § 74.351(r)(6). Light's report, though deficient, was timely filed. We find the trial court abused its discretion in finding the report sufficient. We reverse the trial court's order and remand the cause to the trial court to consider whether to grant Fischer a thirty-day extension to cure the deficiencies. *Leland v. Brandal*, 257 S.W.3d 204, 207-08 (Tex. 2008); *Craig v. Dearbonne*, 259 S.W.3d 308, 313 (Tex. App.—Beaumont 2008, no pet.).

REVERSED AND REMANDED.

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CHARLES KREGER
Justice

Submitted on November 18, 2010
Opinion Delivered December 16, 2010

Before Gaultney, Kreger, and Horton, JJ.